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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 1228

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ROBERT R. WILLIAMS, ANNA M. WILLIAMS, THE  
WIFE OF SAID ROBERT R. WILLIAMS, AND FORMERLY  
ANNA M. PERRY, JOHN W. DUBOSE, AND RALPH B.  
FERGUSON,

*Petitioners,*

*vs.*

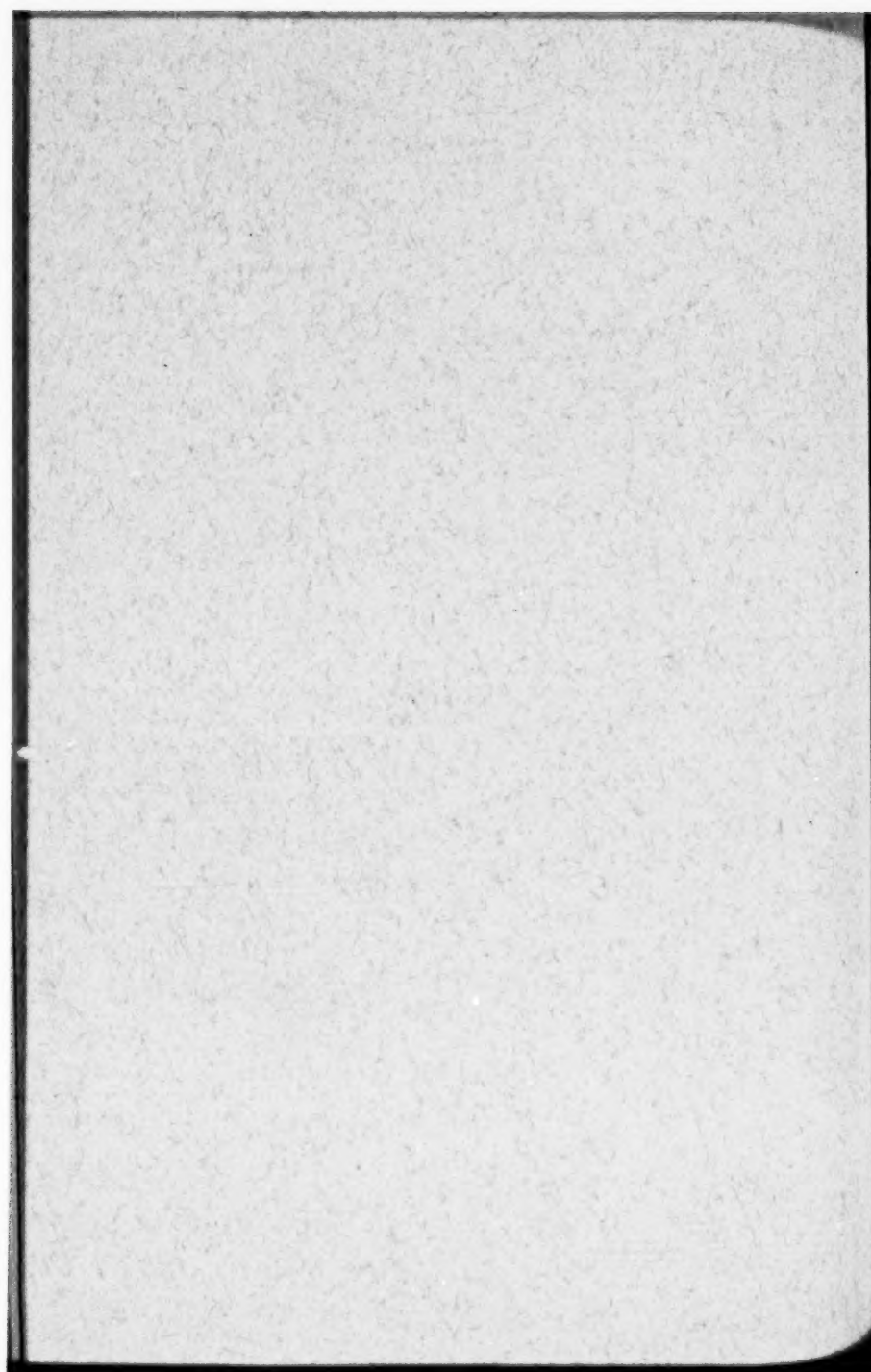
KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN  
ORSDEL, AND UNITED STATES FIDELITY AND  
GUARANTY COMPANY, A MARYLAND CORPORATION.

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.

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E. ALBERT PALLOT,  
*Counsel for Petitioner.*



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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

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*To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Fifth Circuit entered after rehearing on March 10, 1942, affirming the judgments of the District Court of the United States for the Southern District of Florida, Miami Division,

entered on November 27, 1940 and December 2, 1940, respectively.

### **Opinion Below.**

The opinion of the court below filed January 30, 1942, is reported in 125 Fed. (2d) 208. This opinion is shown on pages 76 to 78, inclusive, of the Transcript of Record. There was no opinion of the court below in connection with its order denying the rehearing filed March 10, 1942.

### **Basis of Jurisdiction.**

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. 43 Stat. 938, 28 U. S. C. A. 347 (a).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed January 30, 1942; Petition for Rehearing was filed February 18, 1942; and rehearing was denied on March 10, 1942. Application for stay of mandate pending application in this Court for writ of certiorari was made, and order staying the mandate until action of this Court upon this application for certiorari is had, was entered on the 21st day of April, 1942.

### **Summary Statement of Matters Involved.**

Several citizens of Florida, respondents herein, and obligees in a Five Thousand Dollar (\$5,000.00) supersedeas bond, given in a State court proceedings, sued the surety upon said bond, a Maryland corporation, and one of the respondents herein, as sole defendant in a Florida State court in Miami, Florida (R. 7-13). The said surety removed the case to the United States District Court for the Southern District of Florida, Miami Division, basing the jurisdiction of said district court upon diversity of citizenship (R. 13-15). After the said cause had been so removed, the said surety as Third Party Plaintiff brought

in as Third Party Defendants, the principals in said bond, the petitioners here, who were all citizens of the State of Florida (R. 47-48, also Third Party Complaint R. 16-47). In other words, all of the parties in the said suit in said District Court were citizens of the State of Florida, with the exception of the said surety company which was a Maryland corporation. By the terms of the said bond, the liability upon the part of said surety was joint with, and not several from that of the principals, these petitioners (R. 11-13). Said principals, these petitioners, moved the Federal District Court to remand said cause to the State court for lack of Federal jurisdiction, and also moved said District Court to dismiss the original cause of action because the plaintiffs therein had no substantive right to proceed against one of several joint obligors in the absence of the other obligors jointly liable with the sole defendant, the State law being to this effect (R. 51-53). Both motions were denied by the said District Court and ultimately judgment was entered for the plaintiffs against said surety, and for said surety as Third Party Plaintiff against the Third Party Defendants, these petitioners (R. 58-61). These judgments were affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on the ground that the said surety company had waived the non-joinder of the principals in said bond, these petitioners, as defendants in the original suit, and on the further ground that said principals, these petitioners, could have interposed any defense they had, or the surety company had, and failed to avail themselves of these rights. (See opinion cited above.) This was held by said Circuit Court of Appeals, notwithstanding the fact that said principals, these petitioners, had availed themselves of the right to plead that which the said surety had waived, both by filing the said motion to remand and by filing the said motion to dismiss, and notwithstanding the fact that Rule 14 of the

Rules of Civil Procedure for District Courts expressly grants to Third Party Defendants the right to assert any defense which the Third Party Plaintiff has to the plaintiffs' claim.

### **Questions Presented.**

The fundamental questions presented in this petition are as follows, to-wit:

1. In a suit upon a Five Thousand Dollar (\$5,000.00) Supersedeas Bond, instituted in a Florida Court and removed to the proper U. S. District Court for said Florida Court on the ground of diversity of citizenship, wherein said plaintiffs were citizens of Florida and obligees in said bond, and the sole defendant was a Maryland corporation, and surety in said bond, by the terms of which the liability upon the part of said surety was joint with and not several from that of the principals in said bond, who were citizens of Florida, were served, and were brought into said District Court as Third Party Defendants by said surety, does said District Court have jurisdiction on the ground of diversity of citizenship? This question is set forth verbatim on Pages 69-70 of the transcript.

2. In a diversity of citizenship suit in the United States District Court of Florida, upon a Supersedeas Bond given in connection with an appeal taken in a Florida court, in which said suit the plaintiffs were obligees in said bond, and the sole defendant was one of the obligors in said bond, by the terms of which the liability upon the part of said sole defendant was joint with and not several from that of the other obligors in said bond who were omitted as defendants in said suit, were citizens of the same State as the plaintiffs, were personally served in said suit as Third Party Defendants, and properly plead in said suit their non-joinder as original defendants, should the Court disregard the non-joinder of said Third Party Defendants as original defend-



ants, hold that the original defendant had waived the right to plead such non-joinder, and enter a judgment for the plaintiffs against the sole defendant, or should the said suit be dismissed on its merits?

Simplifying the two questions of law stated above, they mean nothing more or less than the following:

Is there Federal jurisdiction on the ground of diversity of citizenship in a suit against one of several joint obligors where the omitted obligors are citizens of the same State as the plaintiffs and can be personally served, and if there is such Federal jurisdiction, should the suit be dismissed on its merits where the law of the state is to that effect because the plaintiffs have no substantive right to proceed against one of several joint obligors?

#### **Reason for Granting the Petition.**

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

Rule 82 of the New Rules of Civil Procedure for District Courts of the United States expressly provides: "These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

Prior to the passage of said new rules of civil procedure, the Federal District Courts unquestionably would not have had any jurisdiction in this case.

28 U. S. C. 111 (Judicial Code 50) in substance provides that where a defendant is neither an inhabitant of nor can be found within the district where the suit is brought, the court may proceed without him and his nonjoinder cannot be plead in abatement. The question here presented to this court is really a question of whether or not the Third Party procedure under said new rules can be so used as to give jurisdiction to a Federal District Court where it

did not exist before. The Circuit Court of Appeals for the Fifth Circuit in its opinion has held that the sole defendant can waive the right of the Third Party Defendants to plead their own non-joinder, although said Third Party Defendants will be bound by the judgment against the original defendant. The said Circuit Court of Appeals in the same opinion held that said Third Party Defendants could have plead any defense they had in the original cause of action which in effect makes them parties defendant for the purpose of pleading, but not for the purpose of jurisdiction. There is great confusion upon the jurisdictional question of diversity of citizenship where these third party proceedings are involved. Had the case proceeded against the sole defendant and there had been no third party defendants, the Federal Court would have had jurisdiction to enter a judgment against said sole defendant, it not having plead the non-joinder of those jointly liable with it. But can such sole defendant waive the right of third party defendants to plead their non-joinder, and thereby confer jurisdiction upon the Federal Court so as to bind said third party defendants? In other words, can you bind the third party defendants by the original judgment, and at the same time prohibit them from pleading any defense which the sole party defendant could have plead?

There can be no more important question than this question determining the rights of third party defendants in connection with the original suit, both as to the merits of said suit and as to the jurisdiction of the Court.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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